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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Development of Competition and Diversity in Video Programming Distribution and Carriage, MM Docket No. 92-265

Dear Ms. Searcy:

Enclosed are an original and nine copies of the Comments of Liberty Media Corporation in this proceeding. We would appreciate your assistance in distributing a personal copy of Liberty's Comments to each Commissioner.

Thank you for your assistance in this matter.

Very truly yours,

Robert Hoegle

Robert L. Hoegle

RLH:sss
Enclosures

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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

COMMENTS OF LIBERTY MEDIA CORPORATION

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SUMMARY

Liberty Media Corporation ("Liberty") has ownership interests in cable operators and satellite programming services. Consequently, it has a direct and important interest in the Commission's rulemaking to implement Section 628.

The Commission correctly has identified the requirement of anticompetitive harm as a "critical threshold requirement" under the statute. Thus, actual injury to competition in providing satellite programming to consumers must be an essential element of the Commission's implementing regulations and a prerequisite of any complaint alleging a violation of Section 628.

Although the "precise showing of harm" and the specific factors required to prove a violation of Section 628 will vary depending on the nature of the alleged violation, a complainant alleging injury due to unequal access to programming must demonstrate that: (1) it competes for subscribers, both functionally and geographically, with a rival distributor that obtains satellite cable or satellite broadcast programming at more favorable prices, terms or conditions; (2) the disparity in prices, terms and conditions is reflected in the favored distributor's retail pricing; and (3) because of this disparity, the complainant cannot effectively compete with the favored distributor in selling satellite programming services to consumers.

In determining the appropriate ownership attribution standard for purposes of Section 628, the Commission must

consider: (a) the specific nature of the problem identified by Congress -- that vertically integrated satellite cable programmers may have "the incentive and ability" to favor their affiliated cable operators; (b) the additional protections afforded under Section 628 and other provisions of the 1992 Cable Act which address these concerns; and (c) the express intent of Congress that the Commission "rely on the marketplace to the maximum extent feasible" to promote diversity of viewpoints. Viewed in this context, an attribution standard of actual voting control -- at the stockholder or director level -- or its behavioral equivalent will achieve the statute's purpose without stifling programming investment. The broadcast attribution standards, which are "unique and require distinct analysis," are unnecessarily restrictive and inappropriate.

The Commission proposes four options for developing objective discrimination standards -- three of which are founded on Section 202 common carrier principles, Robinson-Patman Act antitrust principles, and regulations applicable to international trade. Because none of these statutory schemes is directly applicable to programming services, the Commission should fashion a new standard which is based upon certain fundamental principles common to each statutory scheme but which takes into account the unique qualities of programming and the differences among the providers and consumers of such services.

The common principles upon which the Commission should draw in developing standards include the following:

• Like Services. Different prices, terms and conditions for different services are not discriminatory. For example, because regional sports networks offer different value to subscribers located in different areas of a given region, concentric pricing of such services promotes diversity and is not discriminatory. Likewise, the delivery of satellite cable programming to cable operators is not "like" the delivery of such programming to customers of HSD distributors because of differences in distribution plant, signal security, authorization procedures and equipment, services available to viewers, and, in the case of satellite broadcast programming, the legal status of such services.

• Different Classes Of Customers And Uniform Discounts. Different prices to different classes of customers are neither unfair nor discriminatory. Programmers must be able to respond to differently situated customers and take into account, among other things, differences in costs among distributors, the distribution function(s) which they perform, their prior experience and credit history, and methods of carriage. In any event, uniformly available volume discounts that treat similarly situated customers alike are not discriminatory.

• Meeting Competition. Decisions under each of the statutes to which the Commission refers have recognized that different prices, terms and conditions are justified in order to meet competitive offerings. A satellite programmer may adjust its prices to meet competition in order to keep existing customers or to attract new ones.

• Scale Economies, Cost Savings Or Other Economic Benefits. Section 628 plainly authorizes price differences based on scale economies, lower costs or other "direct or legitimate economic benefits." The Commission should generally identify those kinds of "economic benefits" justifying discounted rates. For example, program services may offer volume discounts to large distributors because they can collateralize the contracts and obtain financing for their ventures. Large-volume sales may increase the promotion of programming services, generate broad consumer recognition and acceptance, and increase advertising revenues.

While the establishment of a presumptively nondiscriminatory region of price differentials might ease the Commission's administrative burden and provide guidance to the industry, the boundaries of the safe harbor region will be difficult to determine. "Bright line" standards of discrimination must take into account numerous differences among services, costs, carriage arrangements, technologies and competitive conditions. Consequently, multiple "reasonable regions" of varying sizes would be required.

The Commission has recognized that program exclusivity often serves the public interest by promoting competition and programming diversity. In addition to reaffirming such benefits, the Commission should, at the very least, permit exclusive contracts in cabled areas for new programming services and the introduction of existing services to previously unserved areas and for local programming services. The Commission should also permit exclusive offerings to meet a competitor's offer of exclusivity. Finally, where comparable programming alternatives are otherwise available or alternative media have entered exclusive contracts with other programmers, exclusivity should be permitted.

In accordance with its tentative conclusion, the Commission should grandfather programming contracts which predate the adoption of its rules. Such contracts were made in accordance with existing law and have served as the basis of contractual commitments by programmers. In any event, programmers would not have the resources to renegotiate simultaneously their existing contracts.

The Commission's proposal also raises the following additional important enforcement and implementation issues: (1) standards based on penetration levels or volume ratios cannot substitute for a particular claimant's prima facie case; (2) Commission involvement in setting the price, terms and conditions of particular contracts poses additional constitutional concerns; (3) the proposed enforcement procedures must be revised to ensure procedural fairness; and (4) the Commission should narrowly craft its prohibition of coercion, discrimination and retaliation under Section 616 to ensure that it does not preclude normal and legitimate negotiations regarding financial interests and exclusivity.

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COMMENTS OF LIBERTY MEDIA CORPORATION

Liberty Media Corporation ("Liberty") submits these comments in response to the Commission's Notice of Proposed Rule Making ("NOPR") in this proceeding. Congress requires the Commission to prohibit unfair methods of competition that significantly impede the distribution of satellite programming to consumers while promoting programming development, diversity and competition. The Commission's Rules must permit flexible competitive responses to rapidly changing and widely varying marketplace conditions.

Liberty's Interest In This Proceeding

As an owner of both cable programming and operating interests, Liberty is directly interested in this proceeding. More specifically, Liberty has ownership interests, many of which are non-controlling, in a number of partnerships and corporations which operate cable television systems serving approximately 3.5 million subscribers. Liberty has substantial ownership interests in Encore (90 percent) and American Movie Classics (50 percent) and minority interests in The Family Channel, QVC Network, Black Entertainment Television, The Jukebox Network, and Court TV.[1] Liberty also has direct or indirect ownership interests in several regional sports programming services and in Prime SportsChannel Networks, which provide a "backdrop" feed to such services. Finally, Southern Satellite Systems, Inc., a satellite carrier of SuperStation WTBS, and X*PRESS Information Services Ltd., which provides the national information services known as X*PRESS Executive and X*PRESS X*CHANGE, are wholly-owned subsidiaries of Liberty.

Preliminary Statement

As the Commission recognized after its exhaustive study of the cable industry, "[t]he video marketplace continues to be a highly dynamic sector in the midst of transition." Competition, Rate Deregulation And the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd. 4962, 4971-72 (1990) ("Report to Congress"). The pace of change only continues to accelerate. The coupling of fiber optic and digital compression technologies offers a new world of expanded channel capacity. "Cellular" cable is

[1] Liberty is seeking to acquire a controlling interest in the Home Shopping Network.

entering the marketplace, and Commission initiatives have increased the competitive potential of MMDS. Telephone companies are actively pursuing Section 214 applications to provide test and commercial video dialtone service. DBS service, financed by a General Motors subsidiary, will finally become a reality.

Program suppliers must have the ability to respond to the commercial needs of these different and changing alternative distribution media. Flexibility -- not uniformity -- is the touchstone of this video marketplace. The value of particular programming varies among distributors, as does the value of various distribution technologies among programmers. For example, the alternative methods by which different distributors market the same programming, e.g. by tier, a la carte, or on demand, necessarily will affect a programmer's revenues and prices. Competition among programmers and among distributors continues to increase and often requires different responses in terms of the price, terms and conditions of program sales.

In this evolving world, flexibility and differentiation are evidence of competition -- not unfairness or discrimination. Broad "bright-line" tests and presumptions that ignore differences in service, functionality, value, and competition will prove unworkable, impede diversity, and distort the marketplace. Consequently, the Congressional charges that the Commission "promote...the diversity of views and information through cable television and other video distribution media" and "rely on the marketplace, to the maximum extent feasible," are critical. <u>See</u> Cable Television Consumer Protection And Competition Act of 1992 ("1992 Cable Act"), Sections 2(b)(1) and (2).

I. Injury To Competition In Providing Satellite Programming To Consumers Is An Essential Element Of Prohibited Discrimination Under Section 628(b).

At the outset, the Commission acknowledges that:

> The plain language of Section 628(b) suggests that our regulations should only implicate practices that are both: (i) "unfair," "deceptive" or "discriminatory," and (ii) could significantly hinder multichannel video programming distributors from providing satellite programming to consumers.

NOPR at ¶10. Consequently, the Commission initially seeks comment on how the requirement of anticompetitive harm, "which is a critical threshold requirement under the statute, interacts with the remainder of Section 628 in proscribing specific practices or conduct." <u>Id.</u> Specifically, the Commission asks: (1) what factors would demonstrate that particular conduct "restrains a multichannel video program distributor from providing programming to subscribers;" (2) whether the Commission should focus its analysis on harm to consumers or to competing multichannel distributors; and (3) how it should identify the relevant geographic market for its analysis of whether particular conduct causes anticompetitive harm. NOPR at ¶¶10-11.

As a preliminary matter, the Commission's statement of this "critical threshold requirement" appears to extend the reach of the prohibition beyond the plain language of the statute. Contrary to the Commission's interpretation, the statute prohibits those unfair or deceptive acts which <u>have</u> "the purpose or effect" of significantly hindering or preventing a multichannel video programming distributor from providing satellite programming to consumers, not acts or practices which <u>could</u> have that purpose or effect. Likewise, the competitive injury standard under Section 628 is more stringent than the standard under the Robinson-Patman Act, which prohibits certain conduct if its effect "<u>may</u> be substantially to lessen competition." 15 U.S.C. §13(a).

Thus, actual injury or conduct which necessarily would result in such injury to competition in providing satellite programming to consumers must be an essential element of the Commission's implementing regulations and a prerequisite of any complaint alleging a violation of Section 628. Although the "precise showing of harm" and the specific factors required to prove a violation of Section 628 will vary depending on the nature of the alleged violation, a complainant alleging injury due to unequal access to programming must demonstrate that: (1) it competes for subscribers, both functionally and geographically, with a rival distributor that obtains satellite cable or satellite broadcast programming at more favorable prices, terms or conditions; (2) the disparity in prices, terms and conditions is reflected in the favored distributor's retail pricing; and (3) because of this disparity, the complainant cannot effectively compete with the favored distributor in selling satellite programming services to consumers.[2]

The first requirement is that the complainant compete functionally and geographically with the allegedly favored distributor. Consistent with the case law applicable to "secondary-line injury" under the Robinson-Patman Act, where customers do not compete the "threshold requirement" of the statute cannot be met:

> Obviously, the requisite adverse competitive effects on the customer level cannot be established unless the various customers compete with each other, geographically as well as functionally.

---

[2] Complaints based on unavailability or discrimination in prices, terms and conditions of satellite broadcast programming should face an additional hurdle. The Commission has determined that "entry into superstation distribution is extremely easy." Inquiry into the Scrambling of Satellite Television Signals And Access to those Signals by Owners of Home Satellite Dish Antennas (Second Report), 3 FCC Rcd. 1202, 1206 (1988). Consequently, a multichannel video programming distributor denied access to specific superstation programming or alleging discrimination cannot claim that it has been prevented from or significantly hindered in distributing satellite broadcast programming absent a showing that substantial barriers to entry preclude it from uplinking broadcast programming.

5 J.O. Von Kalinowski, Antitrust Laws And Trade Regulation, §30.02[3] (1992); see Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578, 585 (2d Cir. 1987) (favored and disfavored purchasers must compete at "the same functional level...and within the same geographic market"). Thus, the relevant geographic market(s) are the area(s) in which the complaining multichannel video programming distributor competes with the allegedly favored distributor. Where the complainant is located in a different geographic market or functions at a different distribution level, there can be no violation of Section 628.

The second element requires an effect on retail prices. Even though two multichannel video programming distributors are located at the same distribution level in the same geographic market, differences in the price, terms and conditions pursuant to which they purchase satellite programming may have no effect on their respective prices to consumers. For example, one distributor may have substantial fixed costs -- based, for example, on the construction, operation and maintenance of its distribution plant -- while the other distributor has no such distribution plant and operates primarily in the manner of a program packager and sales agent. As a result, even though the former may obtain satellite programming at lower prices than the latter, their retail prices may be comparable. Consequently, the disparity in the satellite programmer's price to its competing customers does not significantly hinder or prevent the latter distributor from providing satellite programming. In short, the "threshold requirement" has not been met, and there can be no violation of Section 628.

Again, this approach is consistent with the Robinson-Patman Act and the antidiscrimination principles generally applicable to common carriers. Under the Robinson-Patman Act, a mere difference in the price a seller charges its various customers is not sufficient to violate the Act. See, e.g., Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578, 584 (2d Cir. 1987) ("The act does not, however, require that sellers offer to their purchasers one uniform price.... [P]rice discrimination (or pricing on a non-equal basis) standing alone is not illegal per se"). Rather, price differentials must be sufficient in amount and duration to influence the favored distributor's resale price. See, e.g., Quaker Oats Co., 66 F.T.C. 1131, 1191 (1964) (no showing that price of oat flour is a "sufficiently significant element in the price of the finished product to be a cause of adverse competitive effects.") Likewise, the antidiscrimination provisions of the Interstate Commerce Act require a complainant to demonstrate not simply a difference in a carrier's rate to shippers, but a difference that adversely affected the shippers' prices. See, e.g., Interstate Commerce Comm'n v. United

States, 289 U.S. 385, 392-93 (1933) ("the absorption by a complainant of a discriminatory charge does not avail to establish damage, or to measure its extent, in the absence of a showing that prices were affected by the differential rate").

The third requirement -- that the disparity in rates, terms and conditions of sale of satellite programming to competing multichannel video programming distributors substantially hinder or prevent the disfavored distributor "from providing satellite programming consumers" -- is mandated by the plain language of Section 628. This element of the offense is similar to the requirement that an antitrust plaintiff prove not only injury, but also "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977). For example, the Robinson-Patman Act precludes recovery in secondary line injury cases absent proof that a seller's price differential to two competing customers actually results in competitive injury at the customer level:

> Even if the sales at different prices are contemporaneous, involve goods of like grade and quality, the price distinction is not justified by good business cause, and it causes injury to the disadvantaged purchaser, recovery under the Act is precluded absent proof that the price variance detrimentally affected competition.

M.C. Mfg. Co. v. Texas Foundries, Inc., 517 F.2d 1059, 1066 (5th Cir. 1975), cert. denied, 424 U.S. 968 (1976).

The requirement of competitive injury is also consistent with the Commission's analysis of discrimination claims in complaint proceedings involving communications common carriers under Section 202 of the Communications Act. The complainant must demonstrate not "how much better off the complainant would be today if it had paid a lower rate," but rather "how much worse off it is because others have paid less." Illinois Bell Tel. Co. v. American Tel. & Tel. Co., 4 FCC Rcd. 5268, 5271 n.13, recon. denied, 4 FCC Rcd. 7759 (1989). Thus, a multichannel video programming distributor must prove not only that it was injured by a disparity in satellite programmer's prices, terms or conditions, but also that the injury was the type that Section 628 was intended to prevent -- i.e. that the difference significantly hindered or prevented it from providing satellite programming to consumers.

The competitive effect of program price disparities to competing multichannel video programming distributors in a particular market will depend on such factors as: (1) the capital and other costs of the respective distributors; (2) whether customers sell the programming to consumers a la carte or as part of a tier or package of services; (3) the relative quality of the customers' respective distribution services; (4) the extent and duration of the price disparities; (5) the relative profit margins of the distributors; and

(6) the promotional and marketing efforts of the distributors. In short, numerous cost and other factors aside from disparities in program prices, terms and conditions may affect a multichannel video programming distributor's ability to provide satellite programming to consumers. Consequently, the Commission's rules should clearly establish that there can be no violation under Section 628 absent a direct and demonstrated causal connection between the differential in programming prices, terms or conditions and the multichannel video programming distributor's inability to provide satellite programming to consumers.

II. The Broadcast Standards Are Inappropriate Attribution Benchmarks Under Section 628 -- Actual Control Should Be Required.

Section 628(b) prohibits "unfair methods of competition or unfair or deceptive acts or practices" by satellite cable programming vendors in which a cable operator holds "an attributable interest," but does not define an "attributable interest." In determining the appropriate ownership attribution standard for purposes of Section 628, the Commission must consider: (a) the specific nature of the problem identified by Congress -- that vertically integrated satellite cable programmers may have "the incentive and ability" to favor their affiliated cable operators; (b) the additional protections afforded under Section 628 and other provisions of the 1992

Cable Act which address these concerns;[3] and (c) the express intent of Congress that the Commission "rely on the marketplace to the maximum extent feasible" to promote diversity of viewpoints. Viewed in this context, an attribution standard of actual voting control -- at the stockholder or director level -- or its behavioral equivalent will achieve the statute's purpose without stifling programming investment.

A. Broadcast Standards Serve A Different Purpose -- To Promote Program Diversity By Limiting Common Ownership Of Distribution Media.

The Senate Report simply states the committee's intent that the Commission use its broadcast ownership attribution standard or "other criteria the FCC may deem appropriate." Cable Television Consumer Protection Act of 1991, S. Rep. No. 92, 102d Cong. 1st Sess. 78 (1991). The Commission notes that the "Senate version of the programming access provisions was not adopted" in any event and questions whether "some other attribution standard" would be more appropriate than the broadcast standard. NOPR at ¶9. The broadcast attribution standard, which was adopted primarily to address First

[3] More specifically, Section 613(f)(1) imposes several constraints on the ability of vertically integrated cable operators to affect adversely program diversity. It authorizes limits not only on horizontal concentration of cable ownership, but also on the number of channels on a cable system that may be occupied by a vertically integrated cable operator and programmer. Of course, Section 616 offers additional protections for program carriage agreements.

Amendment concerns by limiting common ownership of distribution media, is far more restrictive than necessary to promote the policies underlying Section 628.

The broadcast ownership attribution standard implements multiple ownership rules designed primarily to promote diversity of viewpoints in the context of the limited spectrum available for broadcast use. Corporate Ownership Reporting And Disclosure by Broadcast Licensees, 58 R.R.2d 604, 606 (1985), on recon., 1 FCC Rcd. 802 (1986). The purpose of those rules "is to prevent undue concentration of control in the broadcasting industry, and to encourage the development of the greatest diversity and variety in the presentation of information, opinion and broadcast material generally." Applications to Acquire Interests In A Second VHF Station In Major Markets To Be Designated For Hearing, 3 R.R.2d 909, 910 (1964). These First Amendment concerns, which the Commission concedes are "unique and require distinct analysis," have necessitated "a cautious approach" with respect to broadcast ownership attribution. Corporate Ownership Reporting And Disclosure by Broadcast Licensees, 97 F.C.C.2d 997, 1002-04 (1984), on recon., 58 R.R.2d 604 (1985), on further recon., 1 FCC Rcd. 802 (1986). In fact, the Commission specifically refused to adopt more lenient attribution standards used by other agencies because those standards were designed to implement regulations which "generally are limited to precluding collusive or anticompetitive economic behavior, while our rules also encompass a fundamental concern with diversity of viewpoints." Id. at 1010 (emphasis added). Section 628 serves a different purpose and requires a different attribution standard.

B. Section 628 Is Intended to Promote Competition Among Distribution Media And Includes Additional Behavioral Protections.

Absent overriding First Amendment concerns, Congress has not hesitated to employ higher attribution standards to promote other statutory objectives. For example, Congress adopted significantly higher ownership attribution thresholds for purposes of limiting alien ownership of broadcast licensees. See 47 U.S.C. §310(b). Those rules are intended "to curb alien activities against the United States in time of war." Corporate Ownership Reporting And Disclosure by Broadcast Licensees, 97 F.C.C.2d 997, 1009 (1984). Notwithstanding this national security interest, the Commission noted that the higher standards were "not unreasonable" because an alien shareholder with a 20 or 25 percent interest "would presumably face the united opposition of native shareholders in such circumstances." Id.

A similar rationale also justifies higher attribution standards here. Section 628 is intended, among other things, to prevent a satellite cable programmer in which a